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Via FOIAonline Submission, Electronic Mail, and U.S. Postal Mail

February 28, 2018

National Freedom of Information Officer
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue, NW (2822T)
Washington, DC 20460
Email: hq.foia@epa.gov
Tel: (202) 566-1667

Re: FOIA Records Request

Dear FOIA Officer at EPA:

Pursuant to the provisions of the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552 *et seq.*, and on behalf of The Humane Society of the United States ("HSUS"), I hereby request records showing:

1. Documentation sufficient to show the total amount of money that EPA budgeted for the National Air Emissions Monitoring Study ("NAEMS") during the period between April 19, 2013 and August 1, 2015.
2. Documentation sufficient to show the amount of money that EPA expended on the National Air Emissions Monitoring Study ("NAEMS") during the period between April 19, 2013 and August 1, 2015.

Please exclude from this request documents and communications to which the HSUS was either the originator of the record or was the direct recipient of the record, and please produce all other responsive records. This request is intended to apply to records maintained, controlled, or otherwise retained by the Environmental Protection Agency ("EPA") (including any and all divisions of EPA that maintain related materials).

As used in this request, the term "National Air Emissions Monitoring Study" refers to the study identified in the EPA's 2005 voluntary consent agreement with the animal feeding operation ("AFO") industry, called the Air Compliance Agreement. In paragraph 10, the Air Compliance Agreement explained that EPA will develop Emissions Estimating Methodologies ("EEMs") for AFOs "based on data from the national air emissions monitoring study and any other relevant data and information, to estimate daily and total annual emissions from individual Emission Units and/or Sources."

As used in this request, the term “amount of money” includes, *inter alia*, money for salaries for EPA officials and outside consultants working on NAEMS, for purchases of additional data to be used in the development of NAEMS, and for additional on-site testing.

As used in this request, the term “records” includes but is not limited to any reports, studies, financial materials, webinars, electronic presentations, correspondence including recorded messages, memoranda, meeting notes and minutes, drafts and working papers, notes and summaries of conversations and interviews, electronic mail messages (e-mails), audits, audit reports, contracts, agreements, technical proposals, noncompliance reports, consumer complaints, third-party complaints (e.g. complaints from the general public or employees within the agency), presentations, graphic material, video, and any other form of written, electronic, or recorded information.

If you believe that certain portions of records are subject to an exemption under the FOIA, please redact any such portions with direct reference to the claimed exemption, and produce all non-exempt portions of those documents. *See* 5 U.S.C. § 552(b). For exempted materials, please provide a full or partial denial letter and sufficient information to appeal the denial. At a minimum, please include in this letter basic factual information regarding the denial, including the originator, date, length, and addresses of the withheld items; all explanations and justifications for the denial, including any direct statutory or regulatory references; and how each exemption applies to the withheld materials.

Fee Waiver

HSUS is a nonprofit organization with millions of supporters whose mission is to “create a humane and sustainable world for all animals, including people, through education [and] advocacy.” As a 501(c)(3) non-profit organization, HSUS does not have a commercial, trade, or profit interest in the information requested, and is not requesting “trade secrets and commercial or financial information obtained from a person and privileged or confidential,” as defined by FOIA, or any other information exempted pursuant to 5 U.S.C. § 552(b).

A waiver of search, review, and duplication fees is warranted here because disclosure of the requested records meets the two-part public interest test in that “it is likely to contribute significantly to public understanding of the operations or activities of the government and is not primarily in the commercial interest of the requester.” *Id.* § 552(a)(4)(A)(iii). Both the legislative history and administrative and judicial interpretations of FOIA uniformly make clear that the “fee waiver provision ‘is to be liberally construed in favor of waivers for non-commercial requesters.’” *Schoenman v. FBI*, 604 F.Supp.2d 174, 192 (D.D.C. 2009) (quoting *McClellan Ecological Seepage Situation v. Carlucci*, 835 F.2d 1282, 1284 (9th Cir.1987) (quoting 132 Cong. Rec. 27, 90 (1986) (Sen. Leahy))).¹

¹ Indeed, the legislative history of the fee waiver provision reveals that it was added to FOIA “in an attempt to prevent government agencies from using high fees to discourage certain types of requesters, and requests,” such as those from journalists, scholars, and nonprofit public interest groups. *See Ettlinger v. FBI*, 596 F. Supp. 867, 872 (D. Mass. 1984).

The request at issue satisfies the legal requirements to mandate a public interest fee waiver under both 5 U.S.C. § 552(a)(4)(A)(iii) and EPA's interpretation of the same, as set forth in 40 C.F.R. § 2.107(l). HSUS has the ability to contribute to the public's understanding of federal agencies' operations as well as their policies and activities relating to the monitoring and regulation of air emissions from CAFOs across the country. HSUS is a non-profit advocacy and education organization with a national reach and a commitment to a "sustainable world for all animals," and thus is particularly well-suited to distribute the requested information to individuals and others who may be interested in it. Moreover, HSUS also has no commercial interest in the requested information. *See id.* § 2.107(l)(3).

The information requested will likely contribute significantly to the public understanding of the operations of the federal government: EPA's progress in measuring public health implicating air emissions from large animal feeding operations. *See id.* § 2.107(l)(2). EPA has determined that ammonia is an extremely hazardous pollutant, and that a facility's emissions of over 100 pounds per day create a danger to the local community, which must be reported. In the 2005 Air Compliance Agreement, at paragraph 5, EPA claimed to be developing "improved Emissions-Estimating Methodologies from animal feeding operations," which the agency planned to use to "ensure that all animal feeding operations are in compliance with" applicable federal environmental laws. Yet in August 2014, the Congressional Research Service reported that EPA could not estimate "when it would complete the process" of developing EEMs.² This appears to be the most recent public information available concerning EPA's development of animal feeding operation EEMs.³ Moreover, EPA itself has displayed concern for the health implications of air emissions from swine factory farms. Last year, EPA decided to investigate potential discriminatory public health impacts from North Carolina's "regulation of swine feeding operations."⁴ Therefore, the agency's responsive records to this FOIA request will provide information concerning EPA's progress towards completing EEMs based on National Air Emissions Monitoring Study data—and, consequently, EPA's progress towards regulating air emissions from the operations that the agency itself finds potentially threatening.

HSUS intends to use the information received to communicate this information to other interested individuals. HSUS routinely distributes data, news releases, reports, and copies of original documents to the public directly and to members of the media to generate informative articles.⁵ HSUS also distributes, at no charge, its own information and information obtained from other sources regarding policies and activities relating to animal agriculture and environmental

² Congressional Research Service, *Air Quality Issues and Animal Agriculture: EPA's Air Compliance Agreement*, Aug. 18, 2014, at p. 13, available at <http://nationalaglawcenter.org/wp-content/uploads/assets/crs/RL32947.pdf> (last visited Sept. 27, 2016).

³ *See* EPA, *Air Monitoring at Agricultural Operations*, available at <https://www.epa.gov/afos-air> (last visited Sept. 27, 2016) (linking to two bullet points, the most recent of which discusses the agency's 2012 "draft methods to estimate emissions").

⁴ Feb. 20, 2015 Letter from Velveta Golightly-Howell, EPA Office of Civil Rights, to Earthjustice, available at <http://earthjustice.org/sites/default/files/files/EPA%20Notice%20of%20Acceptance.pdf> (last visited Oct. 10, 2016).

⁵ HSUS's gathering and distribution of information to the public also, and independently, qualifies it for a fee limitation under the courts' broad interpretation of the FOIA's reference to a "representative of the news media," 5 U.S.C. § 552. *See Nat'l Security Archive v. U.S. Dep't of Defense*, 880 F.2d 1381, 1387 (D.C. Cir. 1989).

and public health.⁶ Consumers of this information include scientists, students, governmental entities, the regulated community, media outlets, and the general public.

In summary, HSUS believes that this request satisfies the legal criteria for fee waiver:

1. HSUS is a nonprofit public interest group. The records requested relate to government activities that will contribute to public understanding of how EPA is monitoring emissions from AFOs in many communities. The information sought is of significant public interest and not generally otherwise available. The primary purpose for the request is to further public understanding and knowledge of EPA's progress in developing a process for measuring hazardous air emissions from animal feeding operations, and not to commercially profit from the sale of this information. Because of its size and proven ability to disseminate information to a large segment of the public, HSUS is well suited to contribute to the public's understanding of federal agencies' policies and activities relating to animal agriculture and the public health. Furthermore, HSUS is not seeking information exempted by FOIA.
2. The disclosure of the requested records would be to the primary benefit of the general public. HSUS has demonstrated its ability to review, compile, and disseminate to the general public the information it acquires. This is achieved by state and nationally distributed newsletters, statewide membership mailings, information available electronically via the Internet, and extensive and reliable media contacts. A fee waiver must be granted when the public interest in disclosure is greater in magnitude than the requester's commercial interest. See DOJ FOIA Update, Vol. VIII, No. 1, at 9.

HSUS believes that it has sufficiently met the criteria for a public interest fee waiver for this records request. HSUS often receives fee waivers from a variety of agencies on its FOIA requests.⁷ This request is no different.

If, however, EPA denies the waiver, and the request will involve a number of hours of search time or a number of pages of documents that will cause the FOIA response fees to exceed twenty dollars (\$20.00), please notify me immediately by telephone before processing the request. HSUS requests the notification so that it can decide whether to pay the proposed fees or to appeal the denial of the request for waiver.

⁶ See, e.g., HSUS, *An HSUS Report: Animal Agriculture and Climate Change*, available at <http://www.humanesociety.org/assets/pdfs/farm/animal-agriculture-and-climate.pdf> (April 2011); HSUS, *An HSUS Report: Food Safety and Cage Egg Production*, available at http://www.humanesociety.org/assets/pdfs/farm/report_food_safety_eggs.pdf (May 2011).

⁷ See, e.g., Apr. 17, 2014 Letter from Arianne Perkins, USDA Food Safety & Inspection Serv. Acting FOIA Director, to Peter Brandt, HSUS Senior Attorney, FOIA-2014-00224 ("Based on my review of your April 14, 2013, letter and for the reasons stated herein, I have determined that your fee waiver request does sufficiently meet all of the criteria under the FOIA and the applicable regulations") (Attach. C); May 11, 2015 Letter from Alex Webb, U.S. Army Corps of Eng'rs Assistant District Counsel, to Amanda Hungerford, HSUS Attorney, FOIA Request FA-15-0022 (Attach. D); Oct. 25 Letter from Larry Gottesman, EPA FOIA Officer, to Daniel Lutz, HSUS Attorney, FOIA EPA-HQ-2017-000521 (Attach. E).

Thank you for your assistance in this matter. Please contact me at **(202) 676-2386** if you need any further information or require any clarification regarding this request. Please confirm the receipt of and provide response to the above request within twenty (20) business days, as required by law under the FOIA. 5 U.S.C. § 552(a)(6)(A)(i). If this office is not the appropriate place for this request, please forward the request to the correct office or individual and inform me when doing so.

Sincerely,

/s/

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